Senior Citizens Coordinating Council of Riverbay Community Inc., a/k/a Senior Citizens Coordinating Council of Co-op City *and* Barbara Mathew. Case 2–CA–28713

March 28, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On September 23, 1996, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an opposing brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The primary issue here is whether the Respondent violated Section 8(a)(1) of the Act by discharging three of its employees because they composed, signed, and sent out a letter that threatened a work stoppage with the object of influencing the Respondent in its selection of management personnel, i.e., the director of its Multi-Service Center. A second issue is whether the Respondent violated Section 8(a)(1) by instructing employees to sign a memorandum retracting their alleged protected activities or be terminated. The answer to these questions depends on whether the employees' actions constituted protected concerted activity. The judge found, in effect, that the employees' activity was concerted, but not protected. Accordingly, he found that the Respondent did not violate Section 8(a)(1) by discharging these employees and dismissed the complaint. As discussed below, we reverse.

The Facts

The facts, as set out by the judge and supplemented by uncontradicted testimony, are as follows. The Respondent is a non-profit corporation engaged in providing social services at a large housing project in the Bronx, New York, known as Co-op City. The Respondent has two divisions, the Nutrition Program,[1] and the division at issue here, the Multi-Service Center. The Multi-Service Center receives most of its funding from the New York City Department for the Aging (DFTA).[2] The Multi-Service Center provides social services for aged residents of Co-op City. Until March 1995,[3] William Austin was the director of the Multi-Service Center. As such, he was the top managerial official in charge of this division, as well as the first-line supervisor of the Multi-Service Center employees, social workers Hubert Peck, Barbara Mathew, and Connie Kirkland, part-time bookkeeper Michele Mercado, and longtime employee Blanche Polovetz, who performed office clerical work and minor casehandling tasks. When Austin resigned his position in March,[4] the Respondent appointed Polovetz, the most senior employee at the Center, as the acting director until it hired a new director. Unlike Peck, Mathew, and Kirkland, Polovetz was not a social worker but was, in effect, the office manager of the Multi-Service Center. Polovetz had previously served as acting director when the position of director was vacant.

On May 15, Polovetz met with certain DFTA officials, including Linda Whitaker, its assistant commissioner, Bureau of Community Services, and Jorge Romero, its director of Bronx Programs. In a June 1 letter to Margaret Wilson, the Respondent's acting president, confirming the May 15 meeting and responding to the Respondent's request to promote Polovetz to the position of acting director of the Multi-Service Center, Romero wrote that Polovetz did not meet the minimum requirements to be acting director because she did not have a degree in social work, counseling, psychology, or gerontology and 2 years of human services experience. He also stated that Polovetz did not have the hands-on case management experience required to be a case management director. Romero added that if the Respondent insisted on having Polovetz as acting director, DFTA would not assume any responsibility for any of her actions or decisions that adversely affected the Program or the clients. Romero concluded by stating that DFTA expected that the position of director would be advertised and that when a qualified candidate was chosen, a copy of the resume had to be forwarded to DFTA for approval.

Also in June, the Respondent appointed Candice Harris to be its executive director while she retained her position as the director of the Respondent's Nutrition program.[5] One of Harris' first tasks was to set up a plan to

[1] The Nutrition Program, the larger of the two divisions, operates a kitchen, dining room, and a "meals on wheels" program. Candice Harris is the director of the Nutrition Program.

[2] In this regard, in establishing that the Board had jurisdiction over the Respondent, at the hearing in this case counsel for the General Counsel stated that all the parties agreed that the Multi-Service Center received approximately $202,000 annually in gross income. Later in the hearing, the parties stipulated that DFTA's contract with the Multi-Service Center for fiscal year 1995 was for approximately $202,000.

[3] All dates hereafter refer to 1995 unless otherwise stated.

[4] The judge stated incorrectly that Austin had retired from his position.

[5] Prior to this time, each division had its own director who reported directly to the Respondent's board of directors. Concerned about lack of oversight, the Respondent amended its bylaws to create the position of executive director. The executive director is in charge of both the Nutrition program and the Multi-Service Center. Thus, while each division retained its own director, they now reported to Harris, who, in turn, reported directly to the Respondent's board of directors.

The General Counsel has excepted to the judge's failure to find that both Polovetz and Harris are statutory supervisors under the Act. We find merit in this exception with respect to Harris, since the parties stipulated that Harris possessed supervisory authority within the meaning of Sec. 2(11) of the Act from the time of her appointment as executive director in June, and the actions alleged as unfair labor practices

reorganize the Multi-Service Center and to recruit a new permanent director for that program. Also during the early summer, Frank Chimkin, who had previously worked at the Multi-Service Center as a social worker and was bookkeeper Mercado's boyfriend, applied for the director's job. Social worker Mathew spoke to individuals at DFTA in favor of his appointment.

After Harris' appointment as executive director, she became involved in a dispute over Polovetz' pay. Although Polovetz had verbally informed Mercado several times that she (Polovetz) was the acting director and was authorized to be paid at the director's salary "line" while she occupied that position, Mercado refused to issue pay checks to her in the amount requested, asserting that the authorization had to be in writing and approved by both DFTA and the Respondent. Mercado believed that she (Mercado) was employed by both DFTA and the Respondent because the Respondent received approximately 95 percent of its funding from DFTA. DFTA required that increases in pay be authorized in writing.

Seeking DFTA authorization to pay Polovetz at the director's salary level, Mercado called Romero on July 20. Mercado told Romero that she was aware of the May 15 meeting and the Respondent's obligation to place an ad in the newspaper and interview candidates for the director's position.[6] She then asked Romero whether she could pay Polovetz at the director's salary line. Romero confirmed the May 15 meeting and promised to fax Mercado a copy of his June 1 letter. Romero also told Mercado that she could pay Polovetz at the director's salary level. Mercado continued to insist, however, that the Respondent furnish her written authorization to issue checks to Polovetz on the director's salary line. In early August, Harris and Florence Mack, the Respondent's president, met with Mercado to find out why Polovetz was not being paid at the appropriate level.[7] Mercado insisted that the Respondent give her written authorization before she issued a check at the director's salary level. Although Mack then informed Mercado by a letter of August 8 that Polovetz was the acting director, Mercado still refused to issue a check to Polovetz at the director's salary level because the letter did not authorize her to do so. Mercado finally issued the proper check to Polovetz after Mack sent her another letter on August 14 that explicitly authorized her to pay Polovetz "from the Directors [sic] budget line retroactively."

Prior to learning of the June 1 letter and thereafter, social workers Peck, Mathew, and Kirkland, and bookkeeper Mercado met approximately once or twice a week to discuss their concerns about Polovetz' appointment as acting director. Mathew and Peck were concerned about Polovetz' lack of credentials because Polovetz could not sign off on cases, supervise their work, or provide assistance and guidance in the handling of more difficult cases. Mathew and Peck were also concerned that time was being taken away from their case work because they had to provide assistance to each other with their cases and had to spend more time doing the computer work which Austin, the former director, had done prior to his resignation. Mercado expressed her concerns about the Respondent's insistence that she issue checks to Polovetz without written authorization. Finally, in late July and after Mercado's July 20 telephone conversation with Romero, Mathew called Helen Jenkins, DFTA's program director, to explain the employees' (i.e., Mathew's, Peck's, Kirkland's, and Mercado's) concerns and to inform DFTA that, contrary to Romero's direction as stated in his June 1 letter, the Respondent had made no effort to hire a new director. Jenkins, in essence, told the employees to put their concerns in writing. The employees then composed the August 4 letter at issue here.

About August 10, Peck, Mathew, Kirkland, and Mercado sent the letter, dated August 4 and initially authored by Mercado, to DFTA's Linda Whitaker, with copies to the Respondent's board of directors and to certain other DFTA officials, including Romero, DFTA's director of Bronx Programs, and Jenkins, DFTA's program director. Peck, Mathew, Kirkland, and Mercado also sent copies of the letter to local politicians, including Congressman Eliot Engel, State Assemblyman Stephen Kaufman, State Senator Joseph Galiber, and Bronx Borough President Fernando Ferrer. The letter, the full text of which is attached as Appendix A to the judge's decision, begins by stating that the Respondent "is in a state of crisis" and asks for DFTA's help. The letter goes on to state, inter alia, that:

> On March 10, 1995, Mr. William Austin, MSW, resigned as Director of the Co-op City Multi-Service Center. Since that time the office has been without a director and there are currently no plans to find a replacement. We are without appropriate supervision, and like any other agency, require professional social work supervision.

occurred after that. With respect to Polovetz, we note that the parties stipulated that, as the acting director of the Multi-Service Center, she possessed supervisory authority within the meaning of Sec. 2(11) until sometime in June. No evidence was introduced to show that Polovetz' authority in this regard was diminished after Harris' appointment as executive director, but we find it unnecessary to decide whether she continued to possess such authority. As the acting director of the Multi-Service Center, she was clearly held out as an agent of the Respondent with respect to operations in that center.

[6] Mercado and Mathew testified without contradiction that they first learned of the May 15 meeting from Polovetz herself soon after it occurred. Polovetz did not testify at the hearing.

[7] The General Counsel excepts to the judge's failure to find that Mack was a supervisor within the meaning of Sec. 2(11) of the Act. We find it unnecessary to pass on this issue. The Respondent's witness, Harris, a stipulated supervisor, testified that she was directed by Mack, acting on behalf of the board of directors, to terminate the employees and that she and Mack had jointly decided on giving the employees an option of retracting their letter as a way of avoiding termination. As the Respondent's president, Mack, was clearly acting as its agent.

. . . .

> Our dilemma has made it difficult for us to give our clients the highest quality care management. Instead, we are distracted by issues of office status, power and monetary gain, forcing us to ask ourselves questions like these:
>
> Who can we turn to when we have a question regarding a case? Again, Mrs. Polovetz is not qualified and Ms. Harris' agency has never provided case management.
>
> Who is supervising us on a regular basis and reviewing our cases?
>
> Who is updating us on new policies and procedures?

The letter concludes:

> The Multi-Service staff has met and composed this letter. We are writing to you urging you to take immediate action concerning this matter. We each feel very strongly and united in this cause and are ready to take further action if our pleas go unanswered. Therefore, if we do not see movement in the hiring of a new Director (without interference and with significant DFTA involvement) we, the staff of the Co-op City Multi-Service Center, are prepared to take a job action wherein we will begin not reporting to work until sufficient measures are taken to hire a new Director.

Peck, Mathew, Kirkland, and Mercado all signed the letter.

Harris first learned of the letter on Saturday, August 19, through a telephone call from Mack. Both Harris and Mack were upset by the letter, particularly because it was sent both to Whitaker and other DFTA officials and to various politicians. On Monday, August 21, Harris and Mack visited the Multi-Service Center where, over objections from Peck and Mathew, they first met alone with Mercado. Polovetz also attended this meeting. At the meeting, Harris told Mercado that the Respondent had contracted out the bookkeeping work and gave Mercado 2 weeks' notice. Harris denied Mercado's claim that she was being terminated because of the letter. Harris also stated, however, that the letter was "vile" and poorly thought out and that when you put things in writing, you have to be on firm ground before making charges. During their conversation, Polovetz spoke sarcastically of the "beautiful letter" that Mercado had sent to DFTA's Linda Whitaker and interjected several times that the letter was vicious and vindictive.[8]

After the meeting, Harris and Mack, again accompanied by Polovetz, met with Peck and Mathew. Kirkland was not at the facility at this time, and Harris rejected Peck's and Mathew's request to delay the meeting until Kirkland could attend. Harris told Peck and Mathew that both she and the Respondent's Board were upset that they had gone outside the agency. Peck and Mathew told Harris and Mack of their concerns related to having no supervision and of the extra time they had to work. Harris told Peck and Mathew that they would have another meeting on Wednesday, August 23. Harris had not yet decided to discharge any of the social workers.

On Tuesday, August 22, Mathew called Harris and either told her that the social workers would not meet with her again unless a DFTA official were present or requested that a DFTA official be present at their next meeting. After the telephone call, Polovetz told Mathew that what she had just done was the straw that broke the camel's back and that Harris and Mack were on their way over to Multi-Service Center. Mathew then left the facility on other business and was absent when Harris and Mack arrived. At Peck's request, the meeting was delayed until Mathew could return. After waiting some time, however, Harris said that she could not wait any longer and held the meeting with Peck and Kirkland alone. At the meeting, Harris presented Peck and Kirkland with a letter retracting their August 4 letter and told them that they must sign it in order to retain their jobs. Peck refused to sign the letter and was fired. Kirkland signed the letter and was retained. On Wednesday, August 23, Harris returned to the Multi-Service Center and gave Mathew a letter of termination dated August 22. Harris told Mathew that her services were no longer needed and that she should clean out her desk and leave.[9]

Analysis

As explained above, the primary issue here is whether Peck, Mathew, and Mercado's conduct in composing and sending the August 4 letter that threatened a work stoppage unless Polovetz were replaced constituted protected activity. For the following reasons, we find, contrary to the judge, that it did.

Pursuant to Section 7 of the Act,[10] employees have the right to engage in concerted activities for their mutual aid

[8] Mercado secretly tape recorded the August 21 meeting. At the hearing in this case counsel for the General Counsel introduced the tape into evidence and then sought to introduce Mercado's transcript of the tape into evidence as General Counsel's Exhibit 27 (GC 27). The General Counsel excepts to the judge's rejection of GC 27 and contends, in effect, that the transcript should be received into evidence on the basis of Mercado's testimony to the effect that the transcript was an accurate reflection of the tape's contents. We find this exception without merit as the judge, after listening to part of the tape, rejected GC 27 on the grounds that the tape was partially inaudible and that the transcript apparently contained things that were not on the tape. On this basis, we agree with the judge that testimonial evidence, not the tape, is the best evidence regarding what transpired at the August 21 meeting.

[9] Although Harris gave Mathew the dismissal letter on August 23, this does not conflict with the judge's finding that Mathew was effectively discharged on August 22. In this regard, the dismissal letter, which is identical to the one that Peck received, was dated August 22. Further, on August 23, Harris did not give Mathew an opportunity to sign the retraction letter before she notified Mathew of her dismissal.

[10] Sec. 7 of the Act states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representa-

and protection. Concomitantly, an employer may not, without violating Section 8(a)(1) of the Act, discharge or otherwise threaten, restrain, or coerce employees because they engage in such activities. Not all concerted activity, however, is protected.[11] In cases such as the present one, where employees seek to protest the selection or termination of a supervisor or other management official, an analysis of whether the employees' activities are protected under the Act is fact-based and depends on whether "such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do." *Dobbs Houses*, 135 NLRB 885, 888 (1962), enf. denied 325 F.2d 531 (5th Cir. 1963).[12] See also *Hoytuck Corp.*, 285 NLRB 904, 907 (1987). In sum:

> Ordinarily, the applicability of the ["mutual aid or protection"] clause is not seriously in question because employers seldom impose discipline upon employees for complaining about matters not affecting their palpable "lot as employees," nor do employees often bring nonwork-related complaints into the employment environment. On the periphery of the clause, however, there appears to be a tacit assumption that employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope of the clause. This distinction seems to be implicit in the line of cases which holds that protests against the appointment or termination of "low-level" supervisors may be protected when directly related to employees' conditions of employment, while similar activity with regard to "top management" of the employer is not safeguarded.[13]

In the present case, the judge found that the employees' activity related to the August 4 letter was not protected because it was, in effect, solely to effect or influence changes in the management hierarchy, i.e., the appointment, in conjunction with DFTA, of a new director as soon as possible, and did not, on its face, deal with any specific working conditions that might have been of concern to the employees. Rather, the judge found that the primary focus of the letter was not the employees' own terms and conditions of employment, but "the status, power and money being paid to Blanche Polovetz." While lack of proper supervision was a main concern of social workers Peck and Mathew raised in the August 4 letter, the judge discounted the effect of the absence of supervision on their jobs because he found that Peck and Mathew "would like to think" that they were in a "professional job, requiring independent judgment on their part." The judge further found that the employees' other concerns, such as the time they consumed doing computer work and advising each other on cases after Polovetz' appointment, were "post hoc rationalization[s]" because they were not specifically set out in the August 4 letter. As to these specific employee concerns, the judge found, in effect, that even if they were in issue, such concerns did not have an impact on the employees' terms and conditions of employment because they did not affect the employees' wages and benefits and did not require the employees to work longer hours.

As to bookkeeper Mercado, the judge found "patently ridiculous" the General Counsel's contention that Mercado reasonably feared that she could be discharged or disciplined if she issued paychecks to Polovetz on the director's line without prior authorization from DFTA and the Respondent. Instead, he found that Mercado's refusal to issue the paycheck to Polovetz was insubordinate behavior which would have justified her discharge. Further, because the Respondent told Mercado on August 21, prior to its decision to terminate Peck and Mathew, that the bookkeeping had been contracted out, the judge concluded that the decision to contract out the bookkeeping work was motivated not by her signature on the letter, but by her past refusal to pay Polovetz. Finally, the judge found that a major objective of the employees in sending the letter was to promote the hiring of Chimkin, Mercado's boyfriend, as the new director. Thus, the judge found that the facts here were "very similar" to those in *Lutheran Social Service of Minnesota*, supra, and *N.Y. Chinatown Senior Citizens Coalition*, 239 NLRB 614 (1978), which, the judge stated, "both involved situations where internal politics relating to the selection of managerial personnel and each agency's

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tives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

[11] As the Supreme Court explained in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–568 (1978):

> It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause. It is neither necessary nor appropriate, however, for us to attempt to delineate precisely the boundaries of the "mutual aid or protection" clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.

[12] As the Board stated in *Dobbs Houses,* 135 NLRB at 888–889:

> For, under well-established precedent, concerted action by employees to protest an employer's selection or termination of a supervisory employee is not automatically removed from the protection of the Act. Each case must turn on its facts. Where, as here, such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do, they are legitimately concerned with his identity. Therefore, strike or other concerted action which evidences the employees' concern is no less protected than any other strike which employees may undertake in pursuit of a mutual interest in the improvement of their conditions of employment. [Footnote omitted.]

[13] *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41 (1980) (citations omitted).

policy goals were the primary concerns of the employees."

We find, contrary to the judge, that Peck's, Mathew's, and Mercado's activities in composing and sending the August 4 letter were protected under the Act because we find, for the reasons set out below, that the August 4 letter protested matters that were of legitimate concern to the employees and which had a direct impact on their terms and conditions of employment. As a preliminary matter, we note that although Polovetz was, in effect, both the first-line supervisor of the Multi-Center employees and its highest management official, we need not decide which job status is relevant here because our analysis does not depend on Polovetz' management position, but on whether her "identity and capability" had a direct impact on the employees' terms and conditions of employment.[14] In finding that they did, we will first explain why we find that social workers Peck's and Mathew's actions were protected. We will then set out our reasons for finding bookkeeper Mercado's activities protected.

As to Peck's and Mathew's activities, we find, contrary to our dissenting colleague, that the judge erred (1) by assuming, in effect, that the social workers did not need direct supervision because they liked to think of themselves as professional employees who exercised independent judgment, and (2) by ignoring in his analysis the influence that DFTA, the Respondent's primary funding source, had on the employees' activities at issue here. As to the former, the judge's finding, in effect, that Peck and Mathew did not need direct supervision is without support in the record. Rather, it is based on the judge's conjecture that Peck and Mathew "like[d] to think" of themselves as professional employees. We find that, on the contrary, Peck's and Mathew's primary concern after Polovetz' appointment as acting director was that they were without adequate supervision because Polovetz had neither the training nor the experience necessary to provide them with guidance in their cases and could not sign off on case files that included recommended courses of action. Such lack of proper supervision is the primary concern of the employees expressed in their August 4 letter. Thus, we find, contrary to our dissenting colleague, that the August 4 letter, on its face, asserted that lack of proper supervision directly affected Peck's and Mathew's working conditions. Therefore their activities in seeking a replacement for Polovetz were protected under the Act. See *NLRB v. Phoenix Mutual Life Insurance Co.,* 167 F.2d 983, 987–988 (7th Cir. 1948), cert. denied 335 U.S. 845 (1948) (where competency of cashier affected salesmen's conditions of employment, their concerted effort to recommend a particular individual was protected by Section 7 of the Act); *NLRB v. Guernsey-Muskingum Electric Co-Op,* 285 F.2d 8, 11–13 (6th Cir. 1960) (concerted protest over identity of new foreman protected where the foreman's lack of experience made the crew's work more difficult).

That a lack of proper supervision impacted the social workers' working conditions is further evidenced by the fact that they had to take time away from their own case work to advise each other on cases and to enter work into the computer, tasks performed by Austin prior to his resignation. Although these concerns are not mentioned in the August 4 letter,[15] we find that they were of actual concern to Peck and Mathew at the time the letter was written and were not, as the judge found, mere post hoc rationalizations. Indeed, as explained above, Peck and Mathew raised these concerns during their meetings with Kirkland and Mercado prior to sending the August 4 letter. We find that these concerns were subsumed in the employees' protest in support of their request for qualified supervision and their threat of a work stoppage unless they saw "movement in the hiring of a new director (without interference and with significant DFTA involvement)."

We further find that the employees' demand for qualified supervision had a direct impact on their terms and conditions of employment because the employees could reasonably believe that their jobs might be in jeopardy if the Multi-Service Center's work did not meet with DFTA's approval and if, as DFTA required, the Respondent did not hire a qualified director.[16] In this regard, the employees knew that DFTA was the Multi-Service Center's primary funding source, that DFTA had required the Respondent to find a qualified director for the Multi-Service Center, that DFTA had to approve the choice as new director, and that DFTA would not assume any responsibility for any actions or decisions by Polovetz that adversely affected the program or the clients. In these

[14] See fn. 12, above.

[15] Contrary to our dissenting colleague's assertion, the fact that these issues are not mentioned in the August 4 letter does not mean that we cannot take them into account in determining whether Peck's and Mathew's activities were protected. See *Atlantic-Pacific Construction Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995), where the court, in considering whether the sending of the letter at issue there related to terms and conditions of employment, conceded that it was not clear from its text that the letter was related to legitimate, protected concerns, but then explained:

> This may be true, but "[s]pecificity and/or articulation are not the touchstone of . . . protected concerted activity." *Springfield Library and Museum Assoc.,* 238 NLRB 1673 (1979). The nexus between the activity and working conditions must be gleaned from the totality of the circumstances[.]

Thus, while the Respondent may not have known of these concerns, it did know of Peck's and Mathew's concerns regarding lack of "appropriate supervision." That they did not list in the letter all of their reasons for their concern about lack of proper supervision does not render their activities in composing and sending the August 4 letter unprotected.

[16] As explained in *Tyler Business Services*, 256 NLRB 567, 568 (1981), enf. denied on other grounds 680 F.2d 338 (4th Cir. 1982): "[t]hat an employee's perception of working conditions may have been incorrect is not sufficient reason to remove the protected activity based on those perceptions from the protection of the Act."

circumstances, we find that the employees could reasonably believe that if the quality of the Multi-Center's work fell below an acceptable level because of lack of proper supervision, and if, contrary to DFTA's direction, the Respondent did not hire a qualified director who met with DFTA's approval, DFTA could refuse to renew its contract with the Multi-Service Center or otherwise reduce its funding. Obviously, such eventualities could have a direct impact on the employees' terms and conditions of employment because with less funding the employees might be required to work fewer hours or could lose their jobs altogether. Thus, we find that Peck's and Mathew's activities in composing and sending the August 4 letter were protected under the Act.[17] Finally, we find that although the employees may have suggested to DFTA officials that Chimkin would be a qualified candidate for the director's position, merely informing DFTA of individuals qualified to be director does not render the employees' activities unprotected.[18]

For the following reasons, we reach the same conclusion as to Mercado. Although Mercado was not a social worker, she shared Peck's and Mathew's reasonably held belief that if DFTA did not find the Multi-Service Center's work satisfactory, it could reduce or eliminate its funding for the Center. If such a reduction occurred, Mercado could also face a reduction in her hours or elimination of her job. Further, although Mercado may not have been affected personally by some of the changes brought about by Polovetz' appointment as acting director, her personal involvement in assisting Peck and Mathew, who were more immediately affected by the changes, falls within the "mutual aid or protection" clause of Section 7. See, e.g., *Delta Health Center*, 310 NLRB 26, 43 (1993).

This, however, does not end our analysis. The judge found that the Respondent would have terminated Mercado even if she had not participated in the protected concerted activity because of her "insubordination" in refusing the Respondent's direction to pay Polovetz at the director's salary level. In cases that turn on employer motivation, the Board applies the test set out in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). First, the General Counsel must establish that protected conduct was a "motivating factor" in the employer's decision. Thus, the General Counsel must show "that the employees engaged in [protected concerted] activity, that the [employer] had knowledge of that activity, and that the [employer] demonstrated . . . animus [toward that activity]." *Regal Recycling, Inc.*, 329 NLRB 355 (1999) (footnote omitted), citing *Wright Line*, 251 NLRB at 1090. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct.

Applying that test here, we find that the General Counsel has established that Mercado's protected activities were a motivating factor in the Respondent's decision to terminate her. In this regard, as explained above, the Respondent knew that Mercado had signed the August 4 letter, the Respondent exhibited animus toward the employees for sending the letter, and the Respondent terminated Mercado on August 21, only 2 days after Harris learned of the August 4 letter. In rebuttal, the Respondent, in effect, argues that it would have discharged Mercado even absent her protected activities because it had decided to contract out the bookkeeping work prior to learning of the August 4 letter and that Mercado's insubordination in refusing to pay Polovetz as directed by the Respondent only reinforced its decision to contract out the bookkeeping work.

We find this argument without merit for the following reasons. First, the outside bookkeeping contract is dated August 25, 4 days after the Respondent terminated Mercado. The Respondent produced no evidence that it had decided to contract out the bookkeeping work or had even contemplated such a move prior to the August 25 date. Further, although Harris continued to be director of the Nutrition Program, that program did not contract out its bookkeeping work. The Respondent offered no explanation of why it was necessary to contract out the Multi-Service Center's bookkeeping work, but not that of the Nutrition Program. As to Mercado's supposed insubordination, the Respondent did not discipline Mercado when she insisted on receiving written authorization prior to issuing the requested checks to Polovetz. It discharged her only after it learned that she had signed the August 4 letter. That Mercado's participation in the composing, executing, and sending of the August 4 let-

[17] Although the August 4 letter contains several misstatements, the employees do not lose the protection of the Act because of these misstatements. As explained in *Guardian Industries Corp.,* 319 NLRB 542, 549 (1995), "[P]rotection is not denied to an employee regardless of the inaccuracy or lack of merit of the employee's statements absent deliberate falsity or maliciousness, even where the accusatory language used is stinging and harsh."

We also note that the fact that the employees sent the August 4 letter to outside officials and sought to improve their lot through outside channels does not render their actions unprotected absent a showing that the employees sought to disparage the Respondent to DFTA or that the letter was disloyal, reckless, or maliciously untrue. *Delta Health Center*, 310 NLRB 26, 43 (1993), affd. mem. 5 F.3d 1494 (5th Cir. 1993). We find such circumstances absent here.

[18] Since we find that the employees' activities were protected because the employees' protests involved issues that had a direct impact on their terms and conditions of employment, we find the present case distinguishable from *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980) (employees protested program decisions by management and the perceived lack of competency of management); and *New York Chinatown Senior Citizens Coaltion Center*, 239 NLRB 614 (1978) (employees criticized executive for his conceit and pride, belittled him for teaching a course, and conveyed belief executive was not running center so as to achieve the social objective for which public funds were being spent), cases relied on by the judge in finding the concerted activities unprotected.

ter, and not her supposed insubordination, was the real reason for her discharge is underscored by the fact that at the August 21 meeting in which Harris discharged Mercado, the alleged insubordination was not mentioned. Rather, as explained above, Harris asserted that the August 4 letter was "vile" and poorly thought out and Polovetz referred to the "beautiful letter" that Mercado had sent to Whitaker and interjected several times that the letter was vicious and vindictive. In such circumstances, we cannot agree with the judge that the Respondent, having taken no disciplinary action against Mercado initially, later decided, without further payment incidents, to terminate Mercado because of her supposed insubordination. Rather, we find that the Respondent terminated Mercado because of her participation in the protected activities discussed above.[19] Accordingly, we find that Mercado was unlawfully discharged for her protected activities.

Having found that the Respondent violated Section 8(a)(1) by discharging Peck, Mathew, and Mercado for engaging in protected concerted activities, it follows that the Respondent also violated Section 8(a)(1) through Harris' statement to Peck and Kirkland on August 22 that they either had to sign a memorandum retracting their protected concerted activities or be terminated. In the circumstances present here, the employees could only construe Harris' statement as a warning that they had to cease and desist from their protected concerted activities or be terminated. See *Delta Health Center*, 310 NLRB at 34.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist from such activity and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent will be ordered to offer Hubert Peck, Barbara Mathew, and Michele Mercado reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, and to make them whole for any loss of earnings and other benefits, in the manner set out in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to these unlawful discharges.

ORDER

The National Labor Relations Board orders that the Respondent, Senior Citizens Coordinating Council of Riverbay Community, Inc, a/k/a Senior Citizens Coordinating Council of Co-op City, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning employees to sign a memorandum retracting their protected concerted activities or be terminated.

(b) Terminating employees because they engage in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Hubert Peck, Barbara Mathew, and Michele Mercado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Hubert Peck, Barbara Mathew, and Michele Mercado whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the letter signed by employee Connie Kirkland retracting her protected concerted activities, and within 3 days thereafter notify her in writing that this has been done and that the letter will not be used against her in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Bronx, New York Multi-Service facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the

[19] As explained in *Holsum Bakeries of Puerto Rico*, 320 NLRB 834, 837 (1996), affd. mem. 107 F.3d 922 (D.C. Cir. 1997), cert. denied 522 U.S. 817 (1997), a "delay in taking adverse action until after there is knowledge of [protected] activity evidences Respondent's unlawful motivation."

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 21, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, dissenting.

Did the Respondent violate Section 8(a)(1) of the Act by discharging three employees, social workers Hubert Peck and Barbara Mathew, and part-time bookkeeper Michele Mercado, because they composed, signed, and sent out a letter that threatened a work stoppage with the object of influencing the Respondent to replace the acting director of its Multi-Service Center, Blanche Polovetz? The resolution of this issue depends on whether Peck's, Mathew's, and Mercado's activities constituted protected, concerted activity under Section 7 of the Act. The judge found that the three employees' activities were concerted, but that they were not protected under the Act because the issues addressed in the letter did not concern wages, hours, or other terms and conditions of employment. To reverse the judge and find that these employees' activities were protected as well as concerted, my colleagues are compelled to go outside the four corners of the letter and engage in speculation about their concerns. I reject such an "analysis" here and find, in agreement with the judge, that these employees' activities were not protected under the Act. I would therefore dismiss the complaint.[1]

The judge has fully set out the facts. In brief, the Respondent is a nonprofit corporation engaged in providing social services at Co-op City, a large housing project in the Bronx, New York. It has two divisions, the Nutrition Program and the division at issue here, the Multi-Service Center (the Center), which provides social services for aged residents of Co-op City. The Respondent is funded through the New York City Department for the Aging (DFTA) and the New York State Office for the Aging (SOFA). Hubert Perry, Connie Kirkland, and Barbara Mathew were the Multi-Service Center's three social workers and Michele Mercado was its part-time bookkeeper. Blanche Polovetz, who had worked at the Center longer than anyone else, took care of office clerical work and minor casehandling matters. William Austin, as the director of the Multi-Service Center, was its highest management official. He was also the first-line supervisor of the Multi-Service Center employees. When Austin resigned his position in March 1995,[2] Polovetz, who had previously served as acting director when the position of director was vacant, was appointed acting director until a new director was found.[3]

Polovetz was authorized to be paid at the director's salary level while she was acting director. She did not, however, provide professional supervision to the case workers who, as found by the judge, needed a minimum of direct supervision in the performance of their case work. The appointment of Polovetz as acting director did not result in any changes to the case workers' wages, hours, benefits, or other conditions of employment.

About August 10, Peck, Mathew, Kirkland, and Mercado sent the letter at issue here, dated August 4, to Linda Whitaker, DFTA's assistant commissioner, Bureau of Community Services, with copies to local officials, politicians, and members of the Senior Citizens Coordinating Council's board of directors. The letter set out both the employees' concerns about the relative power of certain individuals, including Polovetz and Candice Harris, the Respondent's executive director,[4] within the corporate hierarchy and the employees' dissatisfaction with Polovetz' appointment as acting director. As to the latter issue, the letter states:

> Our dilemma has made it difficult for us to give our clients the highest quality care management. Instead, we are distracted by issues of office status, power and monetary gain, forcing us to ask ourselves questions like these:
>
> Who can we turn to when we have a question regarding a case? Again, Mrs. Polovetz is not qualified and Ms. Harris' agency has never provided case management.
>
> Who is supervising us on a regular basis and reviewing our cases?
>
> Who is updating us on new policies and procedures?
>
> . . . .
>
> The Multi-Service staff has met and composed this letter. We are writing to you urging you to take immediate action concerning this matter. We each

[1] A subsidiary issue here is whether the Respondent violated Sec. 8(a)(1) by instructing employees to sign a memorandum retracting their alleged protected concerted activities. Since I find that the activities at issue here were not protected under the Act, I would adopt the judge's dismissal of this allegation also.

Finally, a third issue, addressed at fn. 6 below, is whether the Respondent would have discharged Mercado, even absent her participation in composing and sending the letter at issue here, because of her insubordination in refusing to obey repeated requests by management officials to pay Polovetz at the director's salary level after she became acting director.

[2] All dates hereafter refer to 1995.

[3] The judge stated incorrectly that Austin had retired from his position.

[4] Harris had been the director of the Nutrition Program before her appointment as executive director of the Senior Citizens Coordinating Council in June 1995. She retained that position after her appointment as executive director, but after that time she also oversaw the Multi-Service Center.

> feel very strongly and united in this cause and are ready to take further action if our pleas go unanswered. Therefore, if we do not see movement in the hiring of a new Director (without interference and with significant DFTA involvement) we, the staff of the Co-op City Multi-Service Center, are prepared to take a job action wherein we will begin not reporting to work until sufficient measures are taken to hire a new Director.[5]

Harris first learned of the letter from Florence Mack, the Respondent's president, on about August 19. Both Harris and Mack were extremely upset by the letter because it was sent both to DFTA and to various local politicians.

On Monday, August 21, Harris and Mack visited the Multi-Service Center and met with Mercado. Polovetz was present at the meeting. Mercado was informed that the bookkeeping had been contracted out and was given 2 weeks' notice.[6] After the meeting, Harris and Mack, with Polovetz present, met with Peck and Mathew (Kirkland was not available for the meeting). Harris told Peck and Mathew that she and the Board were upset that they had gone outside the agency. She stated that the employees had taken the position that they were employed by the Department for the Aging and that Polovetz should neither get the job of director nor the director's salary because there were personality problems with her and because she did not have the proper credentials. After further discussion, Harris said that they would meet again on Wednesday, August 23.

On August 22, Mathew called Harris and told her, in effect, that the employees did not want to meet with her unless a representative of DFTA was present. Mathew testified without contradiction that after the phone call, Polovetz told her that what she had just done was the straw that broke the camel's back and that Harris and Mack were on their way over. Mathew further testified that she then left the facility to attend a funeral.

When Harris and Mack got to the facility on August 22, they met with Peck and Kirkland and presented them with a letter retracting the August 4 letter. They told Peck and Kirkland that they must sign the letter in order to retain their jobs. Peck refused and was fired. Kirkland signed the letter and retained her job. On August 23, Harris returned to the Multi-Service Center and gave Mathew a termination letter dated August 22. Harris told Mathew that her services were no longer needed and that she should clean out her desk and leave.

As explained in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563 (1977), "Section 7 [of the Act] provides that '[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .'"[7] Thus, the underlying conduct must be both concerted and protected to fall within Section 7.[8] I find that Peck's, Mathew's, and Mercado's activities in copying and sending the August 4 letter were concerted within the meaning of Section 7.[9] However, in agreement with the judge, and contrary to my colleagues, I find that these employees' activities were not protected under the Act.

In determining whether the employees' activities related to the August 4 letter were protected under the Act, the following language from *Bob Evans Farms v. NLRB,* 163 F.3d 1012, 1020–1021 (7th Cir. 1998) (emphasis added), is particularly helpful:

> Concerted activity is generally protected under the Act provided it is conducted "for the purpose of mutual aid and protection." 29 U.S.C. §158(a)(1). This has been interpreted to mean that the underlying dispute must relate to the terms and conditions of work. . . . Thus, the Act does not protect employees who protest a managerial action that has no bearing on such terms and conditions. Although the line between an employer's business practices and its employment practices can be difficult to draw, *it is generally accepted that the hiring and firing of supervisory personnel is a managerial action unrelated to the terms and conditions of the work of non-supervisory employees* . . . . [There is] a narrow but well recognized exception to th[is] general rule:

[5] The letter (GC Exh. 4) is set out in full at Appendix A of the judge's decision.

[6] As noted above, Polovetz had been authorized to be paid at the director's salary level while she was acting director. Mercado, however, had refused to issue her paychecks at the director's salary level despite repeated directives that she do so. I agree with the judge that Mercado's refusal to issue the correct paychecks to Polovetz constituted insubordinate behavior and that this insubordination justified the Respondent's decision to discharge her. As explained below, I further find that Mercado's activities regarding the August 4 letter were not protected under the Act, and that therefore the Respondent's decision to discharge her was not unlawful on this basis also. Thus, since the General Counsel has failed to establish a prima facie case under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that Mercado's discharge was unlawfully motivated, the burden of proof does not shift to the Respondent to explain why it discharged Mercado, and it is therefore unnecessary to decide which of these lawful reasons prompted the Respondent's decision to discharge her.

[7] Sec. 7 states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

[8] As stated in *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 44 (1st Cir. 1997):

> There can, of course, be no violation of § 8(a)(1) by the employer if there is no underlying § 7 conduct by the employee. Conduct must be both concerted and protected to fall within § 7.

[9] As explained in *KNTV, Inc.,* 319 NLRB 447, 450 (1995):

> An employee's activity will be deemed concerted, when it is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Pacific Electricord Co. v. NLRB*, 361 F.2d 310, 310 (9th Cir. 1966), enfg. 153 NLRB 521 (1965).

> concerted activity over the firing of a supervisor [or to effect the discharge or replacement of a supervisor] is protected when the identity and capabilities of the supervisor have a direct impact on the employees' own job interests and work performance.[10]

Thus, the specific issue here is whether Peck's, Mathew's, and Mercado's activity in composing and sending the August 4 letter which sought the discharge or replacement of Acting Director Polovetz falls within the "general rule" set out above and is therefore unprotected, or whether their activity falls within the "narrow exception" to the general rule and is therefore protected. The answer to this question depends solely on whether the August 4 letter, on its face,[11] raised issues relating to Polovetz' supervision of Peck, Mathew, and Mercado that had "a direct impact on the employees' own job interests and work performance." I find that it did not.

Initially, as the judge explained, the employees' wages, benefits, and hours were not changed when Polovetz was appointed acting director of the Multi-Service Center and the August 4 letter does not raise such issues. In fact, the only issue raised in the August 4 letter that might possibly impact the social workers' (Peck's, Kirkland's, and Mathew's) job performance was Polovetz' alleged lack of qualifications to serve as acting director. However, the August 4 letter merely asserted that the social workers were without "appropriate supervision." It never explained how such an alleged lack of "appropriate supervision" affected the employees' terms and conditions of employment. Rather, the letter simply asserted, inter alia, that Polovetz had been "given the authority to supervise and make decisions over those who are trained to do [home] assessments." I find that such statements evidence not concern for "appropriate supervision," but resentment that a person who was, in effect, the office manager of the Multi-Service Center, had been promoted to the position of acting director over the professional social workers.

That management power and hierarchy were the subjects of the August 4 letter is further evidenced by the letter's statement that Harris, who did not supervise the employees, wanted Polovetz to become the permanent director of the Multi-Service Center because Harris was "positioning herself to become Executive Director of the Senior Citizens Coordinating Council, thereby merging the two programs together."[12] The letter did not attempt to explain how this issue could affect the employees' terms and conditions of employment. Finally, in the only section of the letter where the employees set out why they allegedly were not able to give their clients the "highest quality care management," the reason given was their distraction "by issues of office status, power and monetary gain[.]" It was on this basis, and this basis alone, that the social workers threatened to take a job action and not report to work unless "sufficient measures [were] taken to hire a new Director." Again, the letter failed to explain how issues of "office status, power and monetary gain" affected the employees' terms and conditions of employment. In sum, the letter's mere mention of "appropriate supervision" is not enough to transform a letter that is concerned with "office status, power and monetary gain" into a letter that deals with the employees' "direct concerns," i.e., their terms and conditions of employment.[13]

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[10] As explained in *Puerto Rico Food Products Corp. v. NLRB*, 619 F.2d 153, 155–156 (1st Cir. 1980) (footnote and internal quotation marks omitted):

> [W]e [have] concluded, in conformity with the majority of the courts which have addressed this issue, that not all forms of employee protest over supervisory changes are per se protected. Two basic criteria must be satisfied before employee concerted action over supervisory staffing matters will be protected. First, the employee protest over a change in supervisory personnel must in fact be a protest over the actual conditions of their employment . . . . Secondly, the means of protest must be reasonable.

Since, as explained below, I find that the activity at issue here was not protected under the Act, I find it unnecessary to determine whether the means of protest, the August 4 letter, constituted a reasonable means of protest in the circumstances here where the letter was sent to DFTA, one of the Respondent's primary funding sources, and to local politicians before the employees had first made their concerns known to the Respondent.

[11] Contrary to my colleagues, I would not look outside the contents of the August 4 letter to determine whether the employees were engaged in protected concerted activity. As explained in *Ajax Paving Industries v. NLRB*, 713 F.2d 1214, 1216 (6th Cir. 1983) (emphasis added):

> Section 8(a) of the Labor-Management Relations Act, 29 U.S.C. § 158(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of their right to engage in "concerted activities for the purpose of . . . mutual aid or protection" as guaranteed in section 157. To establish a violation of section 8(a)(1) the Board must demonstrate that the employee was engaged in such protected concerted activity, *that the employer knew of the activity and its concerted nature*, and that the employee's protected activity was a motivating factor prompting some adverse action by the employer.

Here the Respondent knew that the employees had sent the August 4 letter and the contents of that letter. But that is all. Thus, in evaluating what action to take against the employees for their actions, the Respondent could only rely on the contents of the letter to determine whether the employees' actions were protected because the letter raised issues related to their actual conditions of employment. Since the General Counsel has not established that the Respondent knew of these employees' alleged concerns regarding the entering of data in the computer and a lack of case discussion, I find that the majority improperly relies on these, in effect, post hoc rationalizations to bolster its finding that the activity at issue here was protected. For these same reasons, I reject the majority's attempt to bolster their finding that the activity at issue here was protected on the ground that the employees feared that DFTA might cut off its funding of the Multi-Service Center if Polovetz were not replaced. DFTA officials never made such a threat or even suggested that this might occur, and the August 4 letter does not raise the issue.

[12] The social workers were apparently unaware that Harris had been appointed executive director of the council in June.

[13] See *NLRB v. Sheraton Puerto Rico Corp.,* 651 F.2d 49, 52 (1st Cir. 1981) (emphasis in original), where the court, in finding that the concerns raised in the letter at issue did not concern employees' terms and conditions of employment and were therefore unprotected, stated:

Since the August 4 letter did not address Polovetz' "identity and capabilities" and any "direct impact" that they might have had on "the employees' own job interests and work performance," the August 4 letter does not fall within the narrow exception to the general rule that "the Act does not protect employees who protest a managerial action that has no bearing on . . . terms and conditions [of employment]."[14] Accordingly, I find that Peck's, Mathew's, and Mercado's composing and sending of the August 4 letter was not protected under the Act. Therefore, as noted above, I further find that the Respondent's instruction that the employees sign a statement retracting the August 4 letter was not unlawful. Since I find that the Respondent has not violated the Act, I would adopt the judge's dismissal of the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn employees to sign a memorandum retracting their protected concerted activities or be terminated.

WE WILL NOT terminate employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Hubert Peck, Barbara Mathew, and Michele Mercado full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Hubert Peck, Barbara Mathew, and Michele Mercado whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Hubert Peck, Barbara Mathew, and Michele Mercado, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the letter signed by employee Connie Kirkland retracting her protected concerted activities, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the letter will not be used against her in any way.

SENIOR CITIZENS COORDINATING COUNCIL OF RIIVERBAY COMMUNITY, INC. A/K/A SENIOR CITIZENS COORDINATING COUNCIL OF CO-OP CITY

Eric H. Brooks Esq., for the General Counsel.
Paul Goodman Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on May 8 and 9 and June 26, 1996. The charge was filed on August 30, 1995, and the complaint was issued on November 30, 1995. In substance the complaint alleged:

1. That on August 4, 1995, employees Barbara Mathew, Hubert Peck, and Michele Mercado "engaged in concerted activities with each other for the purpose of mutual aid and protection, by writing a letter to the New York City Department for Aging, regarding, among other things their terms and conditions of employment."

2. That on August 22, 1995, the Respondent by Candice Harris, its executive director warned the three employees to sign a memorandum withdrawing the August 4, 1995 letter and warned that if they did not do so, they would be fired.

3. That on or about August 22, 1995, Respondent terminated the aforesaid employees because they wrote the letter.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, is a not-for-profit corporation which is engaged in providing social services at a large housing project in the Bronx known as Co-op City. It has two divisions, one called the Nutrition Program and the other called the Multi-Service Center. The latter division is where the Charging Party and the other employees involved in this case were employed. The Nutrition Program which operates a kitchen, dining room, and "meals on wheel" is much the larger of the two divisions and employs many more people. Funding for the Respondent comes mostly from governmental sources, through the New

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Even when the letter speaks of "promotions, salary scales and working conditions", it immediately uses as examples "company car, expense account, room and board". At least the first two of these do not sound as if they concern the ordinary worker. The occasional use of the words "working conditions" and the fact that some of the words used *could* refer to ordinary workers as well as managers are not enough to transform a letter that is managerial in tone and content into a letter that deals with the direct concerns of the average worker

[14] *Bob Evans Farms v. NLRB*, 163 F.3d at 1021.

York City Department of Aging (DFTA) and the New York State Office for the Aging (SOFA).

Although the Multi-Service Center, by itself, has gross revenues below $250,000, the Respondent, as a whole, has revenues, (in the form of grants), in excess of $1 million, and it purchases goods and materials from directly outside the State in excess of $5000. Inasmuch as the Respondent is a single legal entity, jurisdiction is properly based on the totality of its operations. *Potato Growers Cooperative Co.,* 115 NLRB 1281 (1956). The jurisdictional standard for social service organizations is $250,000 in gross revenue. *Hispanic Federation for Development,* 284 NLRB 500 (1987). As the Respondent, meets this standard, I therefore conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Until March 1995, the Multi-Service Center, had a director (William Austin), three social workers (Hubert Peck, Connie Kirkland, and Barbara Mathew), a bookkeeper (Michelle Mercado) and a longtime employee named Blanche Polovetz, whose job involved office clerical work and minor case handling tasks Polovetz, who apparently had been working at this Center for longer than anyone else, had on previous occasions, been appointed the acting director when the director's job became vacant.

Two of the social workers, Hubert Peck and Connie Kirkland, had academic credentials. Matthew, although not having a Masters of Social Work degree (MSW), nevertheless had social work responsibilities which she learned from experience in the job.

The Multi-Service Center provides various kinds of social services for aged residents of Co-op City and although responsible to the Respondent's board of directors, it had and continues to have a good deal of autonomy. Within the organizational structure of the Respondent, the director of the Multi-Service Center would be highest managerial official of this program. Thus, although he or she would be the employees' first line of supervision, the director would also be the top managerial representative in charge of this division.[1]

Mr. Austin retired in March 1995 and Polovetz was appointed by the Respondent to be the acting director until another director was hired. In this regard, Polovetz was authorized to be paid at the director's salary while she occupied this position. She did not, however, provide professional supervision to the social workers who essentially continued to do what they had done before. And I presume that because the social workers should be considered as professional or quasi professional employees, they had sufficient knowledge and experience to do their jobs with a minimum of direct supervision vis a vis the clients that they served. The appointment of Ms Polovetz as the acting director was not accompanied by any change in the wages of the employees, nor any change in their assigned hours of work. There were no other changes in their existing benefits or other conditions of employment.

It may be the case that with the loss of Austin, the remaining staff felt as if there was more work for each to do. Nevertheless, they were not ordered by the employer, to work more hours and were not told that they could not put in for overtime if they worked in excess of their assigned hours. While Matthew testified that without a director there were many case files that were not signed off on, this is merely a ministerial task and signing off merely means that a case has been reviewed by a supervisor. There is no evidence that the failure to sign off on cases affected the actual job tasks of the employees in question.

To some degree, the loss of Austin perhaps meant that the social workers could not turn to him for advice regarding particular cases. But this simply meant that they could talk to each other and/or had to take professional responsibility and use their own discretion in handling their own cases. His loss may also have meant that they would have to learn to operate the computers that were used to manage case files.

In the case of Mercado, the bookkeeper, she refused to issue paychecks to Polovetz in the amount authorized by the Respondent. She asserted that she felt that despite her appointment as acting director, Polovetz was not entitled to be paid at the director's salary and insisted that she be given written authorization before issuing a check in this amount. According to Mercado, she felt that she needed written authorization from DFTA and the Respondent's board. She concedes however, that in July 1995, she spoke to Jorge Romero from DFTA who told her that the Respondent could pay Polovetz at the director's salary.[2] Notwithstanding that information, Mercado still refused to issue an appropriate check to Polovetz even after Respondent's president, Florence Mack, gave her a letter dated August 8, advising her that Polovetz was named as acting director. Insisting that the letter was not sufficiently clear, Mack sent another letter on August 14 which finally resulted in Polovetz obtaining a check for the amount authorized.

The contention that Mercado reasonably feared that she might be subject to discipline or discharge if she paid Polovetz at the director's salary line in accordance with the Board's wishes, is, in my opinion, patently ridiculous. Discharged by whom? By the people whose wishes she ignored by her insubordinate behavior? There is no evidence that DFTA could or would have caused the Respondent to discharge Mercado if she signed the paychecks to Polovetz in the amount authorized by the Respondent.

In June 1995, Candice Harris was appointed to be the executive director of the Council while retaining her position as the director of the Nutrition program. This meant that the Multi-Service Center reported to her, albeit she did not really begin to

[1] GC Exh. 29 is a job description for the director dated March 1996. It states that the director, who reports to the executive director is in charge of the day-to-day operations of the program, including fiscal management, provision of services, recordkeeping, and reporting to funding agencies. Among other things, it states that the director will be the person to select and terminate professional staff; that he or she is to establish and maintain relationships with other community agencies; that he or she may direct and coordinate fund raising and community activities; and that he or she, in cooperation with the executive director and casehandling supervisor, will assist the Board in evaluation of the program and policy development.

[2] On June 1, 1995, Jorge Romero of DFTA wrote to Margaret Watson, the acting president of the Respondent, confirming a meeting held on May 15, 1995. He wrote that Polovetz did not meet the minimum requirements to be acting director because she didn't have a degree in social work, counseling, psychology, gerontology, and 2 years of human services experience, etc. He continued that if the Respondent insisted on having Polovetz as acting director, DFTA would not assume any responsibility for any actions that she might take. He further wrote that it was expected that the position of director would be advertised and that when a qualified candidate was chosen, a copy of the resume had to be forwarded to the department for approval.

become directly involved in its affairs until she learned that Michelle Mercado took it upon herself to refuse to pay Polovetz at the director's salary level. Upon being appointed to the position of executive director, one of Harris' first tasks was to set up a plan to reorganize the Multi-Service Center and to recruit a new permanent director for that program.

As noted above, the complaint alleges that the Charging Party, Barbara Matthew, in conjunction with, Hubert Peck, Michelle Mercado, and Connie Kirkland wrote a letter on August 4, 1994, which they sent to DFTA, to the board of directors and to others including local politicians. According to the General Counsel, this letter concerned the employees' terms and conditions of employment and therefore constituted protected activity.

In fact, the letter does not, by its terms, talk about the wages, hours, and/or terms and conditions of employment for the employees of the Multi-Service Center who signed the letter. Instead, a perusal of the letter shows that it speaks about either (a) political matters concerning the relative power of certain individuals, (particularly Blanche Polovetz and Candice Harris), within the hierarchy of the corporation and their relationship to the board of directors or; (b) about the employees' dissatisfaction that Polovetz, a longtime employee, was temporarily assigned to be the acting director of the Multi-Service Centers. And in this regard, the entire tenor of the letter is that Mrs. Polovetz, who does not have the proper academic credentials, was promoted to be the nominal supervisor of the social workers and to receive (at least for a while), the director's salary which is more than what the social workers earned. Insofar as what was stated in the letter, it was not their own salaries and working conditions that worried these employees, but rather the salary, status and title given to Ms. Polovetz. As pointed out by the authors of the letter:

> Our dilemma has made it difficult for us to give our clients the highest quality care management. Instead, we are distracted by issues of office status, power and monetary gain, forcing us to ask ourselves questions like these:
>
> Who can we turn to when we have a question regarding a case? Again, Mrs. Polovetz is not qualified and Ms. Harris' agency has never provided case management.
>
> Who is supervising us on a regular basis and reviewing our cases?
>
> Who is updating us on new policies and procedures?

The letter does not indicate what, if any, direct impact, Polovetz' selection as acting director, had on the employees' terms and conditions of employment. Nor does the letter state what if any impact on employee work conditions, would result from the failure to appoint a director who has what they consider to be the appropriate qualifications and credentials. The letter goes on to state:

> The Multi-Service staff has met and composed this letter. We are writing to you urging you to take immediate action concerning this matter. We each feel very strongly and united in this cause and are ready to take further action if our pleas go unanswered. Therefore, if we do not see movement in the hiring a new Director (without interference and with significant DFTA involvement) we, staff of the Co-op City Multi-Service Center are prepared to take a job action wherein we will begin not reporting to work until sufficient measures are take to hire a new Director.

In my opinion, the evidence in this case shows that for at least two of the letter's authors, Barbara Mathew and Hubert Peck, that they would not have been discharged had they agreed to retract this letter. Connie Kirkland who did agree to retract the letter was retained. In the case of Michelle Mercado, although Harris testified that there had been a prior decision to contract out the bookkeeping work, she testified that the letter confirmed her decision to do so.[3]

With respect to Polovetz, the employees assert that they merely sought to have her return to her previous job and to have the director's position filled, as soon as possible, by a person with the proper qualifications. Moreover, as stated in the letter, the authors apparently sought to have DFTA, a governmental agency, be significantly involved in the selection and hiring of any new director by this private corporation without any interference. (Interference by whom? By Candice Harris or Respondent's board of directors?)

In fact, before this letter was sent, Michelle Mercado's boy friend, Frank Chimken, who had previously worked at the Multi-Service Center, had applied for the director's job and Barbara Matthew had lobbied people at DFTA for his appointment. It therefore seems to me that one of the prime reasons why this letter was sent and why the employees sought to have DFTA play a major role in the selection of the new director, was to obtain this job for Frank Chimken.

It is noted that although Matthew testified that the employees felt that a director should have computer skills so as to help them in using the computers, this is not a qualification for the job and there is no assurance that a new director hired by the board of directors would have had such skills. (Nor was this purported qualification mentioned in the letter.) I note too that there is nothing in this record that would indicate that the operation of the computers was so difficult or that their operation was so arcane that reasonably intelligent people could not learn to use them in a reasonable amount of time.

Since this letter is the crux of the General Counsel's case and is claimed to be the reason why the three employees were discharged, it is set forth, in its entirety, at Appendix A. If the statements contained in this letter do not relate to terms and conditions of employment for the Respondent's employees, then the sending of this letter would not be protected concerted activity within the meaning of the Act. And in that case, the complaint should be dismissed.

Although the letter is dated August 4, it was not actually put in the mail until about August 10, 1995. It therefore was not received by anyone until some time during the middle of the week and Candice Harris testified that she first heard of the letter when she got a phone call from Florence Mack on or about August 19.

There is no question but that Candice Harris and Florence Mack were extremely upset by the letter, particularly because it was sent to DFTA and to various local politicians.

Hubert Peck testified that on Friday, August 18, he had lunch with Polovetz who indicated that she had read the letter and said, "[H]ow could you do this to me" and "[D]o you realize

[3] Assuming that there was a decision to contract out the bookkeeping work before the letter was received, I suspect that a reason for doing so was Mercado's refusal to follow orders regarding the Polovetz pay matter. The Respondent offered into evidence a letter dated August 25, 1995, regarding the subcontracting arrangement. It did not have any other documentary evidence showing that the subcontract was decided on prior to Respondent's receipt of the employee letter.

what you have done?" He states that he told her that he didn't want to discuss the letter and that the matter was dropped.

On Monday, August 21, Harris and Mack visited the Multi-Service Center and over the objections of the other employees, insisted on talking first to Mercado. At this meeting, also attended by Polovetz, Mercado was told that the bookkeeping function had been contracted out and that she was given 2 weeks' notice. According to Mercado, when she claimed that her job was being eliminated because of the letter, Harris said that this was not the case. Mercado also testified that Polovetz interrupted a few times saying that the letter was viscous and vindictive. She also testified that Harris said that the letter was vile and poorly thought out and that when you put things in writing, you have to be on firm ground before making charges.

After the meeting with Mercado, Harris and Mack met with Peck and Mathew. Polovetz was also present. Connie Kirkland was not present at the time and Harris rejected the employees' request to delay the meeting until Kirkland was available. At this meeting, Harris did most of the talking and she states that she told the employees that she and the Board were upset that they had gone outside the agency. She states that the employees took the position that they were employed by the Department of Aging and that Polovetz should not get the job of director and not get the director's salary because there were personality problems with her and because she did not have the proper credentials.

According to Barbara Matthew, Harris said that the letter was damaging to the Board's reputation and might affect funding. She states that Harris asked why they had not come to her as executive director and Matthew states that she replied that they were not aware that Harris was the executive director. Matthew testified that Polovetz stated that the letter besmirched her reputation to which she replied that it wasn't personal and was a matter of professional concern. According to Matthew, she said that there were hundreds of cases that were not signed off on and that Harris said that they were going to put someone in position to take care of that matter. Matthew claims that Peck complained about no supervision and extra work. She also testified that Polovetz denied that she ever asked Matthew to lie about reports. (There is nothing in the letter about this last allegation.)[4]

Hubert Peck's testimony regarding the August 21 meeting was that Harris said that she and the Board were outraged by the letter. He states that Harris said that the case managers' concerns were legitimate and that Mack said that there were communications problems. According to Peck, Polovetz said that the employees had defamed her whereupon Harris interrupted and told Polovetz that this was not the time to talk about her feelings. He states that Harris said that the board of directors were concerned about the Multi-Service Center but had not yet decided what to do. Peck did *not* testify that he complained about having to do more work. Nor did he testify that there was any discussion at this meeting about signing off on cases or about any allegation that Polovetz had asked Matthew to lie.

At the conclusion of the August 21 meeting, Ms. Harris said that they should have another meeting on Wednesday, August 23. Harris states that at that point, she had not yet decided to discharge anyone apart from the previous decision to contract out the bookkeeping work.

According to Harris, she received a phone call from Matthew on August 22 who said that the employees would not meet with her unless a representative of DFTA was present. This is, to an extent, corroborated by Matthew, who testified that she asked Harris if the meeting could be postponed because she wanted someone from DFTA to be present at the meeting. According to Mathew, Harris said that the meeting was not a request and that she (Mathew) would pay the price of her action. Ms. Mathew denies that she stated that the employees would not meet with Harris unless a DFTA representative was present.

According to Mathew, after her phone call with Harris, Polovetz told her that what she had just done was the straw that broke the camel's back and that Harris and Mack were on their way over. Mathew then left the facility and testified that she went to a funeral.

On August 22, Harris and Mack met with Kirkland and Peck. According to Peck the employees had tried to get someone from DFTA to come to the meeting and he said that they should wait until Mathew returned. This request was granted by Harris, but after about a half hour, she said that she could not wait any longer; that she was not acceding to Mathew's request to delay the meeting until a representative from DFTA came and that they didn't answer to DFTA. At the meeting which then ensued, Peck and Kirkland were presented with a letter retracting their August 4 letter and told that they must sign it in order to retain their jobs. Peck refused and was fired. Kirkland signed and was retained. Matthew, as she wasn't there, was not given the option of signing the retraction letter. As Harris believed that Matthew had evaded the meeting, she must also have assumed, (correctly), that Matthew would not have signed the retraction letter. In any event, Matthew was also discharged on this date. In a letter dated August 22, 1996, Mathew was told:

> This serves as official notification that as of Tuesday August 22, 1995, your services are no longer required as a member of the staff of our Senior Multi-Service Center.
>
> Your deliberate attempts to impugn the reputation of the Board and circumvent our authority cannot and will not be tolerated.
>
> This action is taken with the full support and authorization of the Senior Citizens Coordinating Council.

III. ANALYSIS

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for the purpose of mutual aid and protection. Concomitantly, an employer may not, without violating Section 8(a)(1) of the Act, discharge or otherwise threaten, restrain, or coerce employees because they engage in such activities.

The question here is whether a group of employees may threaten a work stoppage with the object of influencing or coercing the Respondent in the manner and means by which it selects its management personnel; namely, the director of its Multi-Service Center.

[4] Mathew testified that on one occasion during a survey, Polovetz, while acting director, asked Mathew to say that she had more social work credits than she actually had, thereby justifying certain work that she otherwise would not be qualified to do. This was not denied by Polovetz because she was not asked to testify in this proceeding. Assuming that this occurred as asserted by Matthew, it seems that the issue here had to do with a periodic governmental survey of the Center to insure that its operations were in compliance with State or city regulations. Whatever the ethics, of this alleged request, which was refused by Mathew, the underlying issue to which it was addressed was not employee working conditions.

There are several cases dealing with this type of issue and the results have varied depending upon circumstances. In some cases, the Board has held that employees have engaged in protected activity within the meaning of the Act where they have engaged in concerted protests regarding the retention or termination of a supervisor. On the other hand, there are cases where the Board or the courts have held that such activity is not protected activity.

In *Dobbs Houses, Inc*., 135 NLRB 885, 888 (1962), enfd. denied on other grounds 325 F.2d (5th Cir. 1963), the Board held that employees who concertedly protested the discharge of their supervisor were engaged in protected activity within the meaning of Section 7 of the Act. In this case, the employees went on strike over working conditions and to protest the discharge of the assistant manager who assisted them in confronting the manager about the latter's alleged abusive behavior toward the waitresses. The Board stated:

> [C]oncerted action by employees to protest an employer's selection or termination of a supervisory employee is not automatically removed from the protection of the Act. Each case must turn on its facts. Where, as here, such facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do, they are legitimately concerned with his identity. Therefore, concerted action which evidences the employees' concern is no less protected than any other strike which employees may undertake in pursuit of a mutual interest in the improvement of their conditions of employment.

On the other hand, in *Retail Clerks Local 770*, 208 NLRB 356 (1974), the Board held that such activity, although concerted, was not protected. In that case, the Union, as the employer, discharged several employees who supported a candidate who opposed the incumbent president in an intra-union election. The Board stated:

> Turning to the question of whether the discharge of the six employees by Respondent violated Section 8(a)(1) of our Act, we would reiterate the fact that these employees were not engaged in organizing activities for the purpose of seeking a separate and independent representative. Nor were they seeking to redress grievances within the framework of the existing employer-employee relationship. Rather, it would seem that the thrust and purpose of their activities was to effect a change in the top management of their Employer Union, the election activities merely serving as the means by which this goal could be accomplished. However, an employee of a union like any other employee, has no protected right to engage in activities designed solely for the purpose of influencing or producing changes in the management hierarchy. Nor in pursuing such an object, are the employees in any more favorable posture when these efforts are directed toward a group inside the internal organization itself, such as the union membership or the stockholders of a corporation. An attempt by the dischargees to influence the selection of their chief executive officer is not brought within the protection of the Act because the employer happens to be a union.

In *Puerto Rico Food Products Corp*., 619 F.2d 153 (1st Cir. 1980), the court refused to enforce a Board Order and agreed with the administrative law judge, that the employees, who engaged in a work stoppage to protest the discharge of a low level supervisor, were not engaged in protected activity within the meaning of the Act. Although the Board had concluded that this supervisor had befriended employees and cautioned them about engaging in visible union activity, the court held that this was essentially irrelevant and that there was insufficient nexus to show that the discharge of this particular supervisor had a direct impact on the employees' job interests outside the scope of their usual supervisor-employee relationship. The court stated:

> We have recently addressed the issue presented here—the circumstances under which an employee protest over a change in management personnel is within the protection of section 7. *Abilities and Goodwill, Inc. v. NLRB*, 612 F.2d 6 (1st Cir. 1979). While on the one hand we recognized that employees may have a legitimate concern with the composition of management personnel, especially when a "low-level foreman or supervisor who deals directly with the employee" is involved, we also acknowledged that traditionally "the interest of the employer in selecting its own management team has been . . . insulated from protected employee activity." Furthermore, we noted that the employees' interest in the identity of their supervisors has been "subject to the legitimate claim of employers to a minimum of interference" in the area of supervisory personnel changes. Consequently, we concluded, in conformity with the majority of the courts which have addressed the issue, that not all forms of employee protest over supervisory changes are per se protected. Two basic criteria must be satisfied before employee concerted action over supervisory staffing matters will be protected. First, the "employee protest over a change in supervisory personnel [must] in fact [be] a protest over the actual conditions of the employees. See e.g. *NLRB v Okla-Inn*, 488 F.2d 498 (10th Cir. 1973) (discharged supervisor had attempted to alleviate employees' oppressive workload); *NLRB v Guernsey-Muskingum Electric Coop, Inc*., 285 F.2d 8 (6th Cir. 1960) (foreman allegedly made employees' job harder because foreman was inexperienced and did not understand the work).
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> . . . .
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> Secondly, the means of protest must be reasonable. Generally, "strikes over changes in even low level supervisory personnel are not protected."
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> . . . .
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> To conclude on the present record, as the Board did, that the first criterion was satisfied is to go far in the direction of establishing a per se rule that the identity of a supervisor automatically affects the employees' working conditions. That Perez instructed the employees on the manner of performing their jobs would not appear to distinguish him from any proper supervisor. Generally where employee protests over supervisory personnel have come within the arguable purview of section 7, the supervisor has been linked with an underlying employment related concern. The supervisor has either contributed to the underlying complaint (or been the cause of it) or has sought to alleviate the pre-existing grievance. While protest may have centered on the supervisor's tenure, the problem has been deeper. [619 F.2d 155–156.]

In *NLRB v. Puerto Rico Sheraton Hotel*, 651 F.2d 49 (1st Cir. 1981), the facts involved a letter written mainly by a group of supervisors, but also signed by a group of employees, which

purported to protest against certain "working conditions" and in which there was a request of the Respondent to discharge the Hotel's Manager. The court, speaking through Judge Breyer, (since elevated), reversed the Board conclusion that this letter constituted protected concerted activity within the meaning of Section 7 of the Act and stated, inter alia:

> Second, the letter itself had only one object; the removal of Mr. Orenstein as the hotel's general manager. Mr. Orenstein was not a "low-level foreman or supervisor who deals directly with the employees." [B]ut rather, the highest ranking officer at the hotel. Thus management's interest in securing his loyalty, and maintaining his authority are unusually strong while the interest in extending the National Labor Relations Act's protection of concerted employee activity related to his tenure of office is correspondingly weak (at least absent a distinct showing of a particular harmful effect on employees working conditions as perceived by employees).
>
> Third, the complaints contained in the letter are almost exclusively managerial. They are complaints of lower level managerial staff about higher level managers . . . . Even when the letter speaks of "promotions, salary scales and working conditions," it immediately uses as examples, "company car, expense account, room and board." At least the first two of these do not sound as if they concern the ordinary workers. The occasional use of the words "working conditions" and the fact that some of the words used could refer to ordinary workers as well as managers are not enough to transform a letter that is managerial in tone and content to a letter that deals with the direct concerns of the average worker. [651 F.2d at 52–53.]

There have been cases since *Dobbs Houses,* supra, where employee protest which encompassed or included the selection of a supervisor has been held to be protected activity.

In *Fair Mercantile Co*., 271 NLRB 1159, 1162 (1984), the administrative law judge, with Board approval, held that the discharge of two employees who jointly complained about their supervisor to higher management violated the Act. The judge stated:

> Thus the evidence reflects that the two employees discussed the problems they felt they were having with Morton among themselves and went together, on each occasion, to discuss those problems with higher management. . . .
>
> Moreover, although the complaints . . . may not have been earth shattering, they were protected. . . . Their complaints included such matters as being blamed for the mistakes of others, hostility or rudeness in the way job assignments were made, and other actions by Morton indicating hostility toward them and possible favoritism of other employees.

In the *Hoytuck Corp*., 285 NLRB 904 (1987), the Board held that a petition complaining of the respondent's cook and kitchen supervisor was protected. The petition stated that the supervisor had used "unrestrained profanity in a malicious manner" against employees in the presence of customers and coworkers and it further asked that he be removed from his position immediately, "to avoid any further reoccurrence of harassment." At footnote 3, the Board stated:

> We agree . . . that employee Cline's conduct in preparing and circulating an employee petition that complained of the conduct of the Respondent's cook and kitchen supervisor, Whitaker, towards employees and that further sought his discharge is protected activity here because it is evident that Whitaker's conduct had an impact on employee working conditions. We further note that the finding that an employee protest regarding the selection or termination of a supervisor who has an impact on employee working conditions is protected is consistent with long-standing Board precedent. See, e.g., *Dobbs Houses, Inc*. . . . We wish to make it clear, however, that cases involving employee concerted activity regarding the selection or termination of a supervisor, who has an impact on employee working conditions are distinguishable from cases in which employee concerted activity is designed solely to effect or influence changes in the management hierarchy. In the latter cases, the Board has found that such conduct does not constitute protected activity. See, e.g., *Retail Clerks, Local 770* . . . .

In *Atlantic-Pacific Management*, 312 NLRB 242 (1993), the administrative law judge stated:

> The main thrust of the Respondent's defense . . . is that Davis was not engaged in protected concerted activity in expressing his opposition to the selection of Hart as the property manager.
>
> Although not well drafted, the letter of September 17 opposing the selection of Hart as the property manager, demonstrates the employees' collective concern about the effect that Hart's selection would have on their working conditions at Parcwood. Indeed, if any doubt existed as to this being the underlying motive for the opposition letter, it is dispelled by the unrefuted testimony of Davis that employee Keenan expressed concern that Hart would impose a shorter cleanup time to prepare apartments for rental, and that employee Garvin expressed concern that Hart would change his hours. [Id. at 244.]

In *Korea News,* 297 NLRB 537 (1990), an employee petition was held to be protected and their discharges unlawful when it contained, among other things, (a) a request for resignation of the printing department director, (b) a request for more pay, and (c) a request that time and a half rates be paid for work beyond 40 hours per week. The petition pointed out that the resignation request was the most important point because of the employees perception that the supervisor's behavior was intimidating and overbearing. Unlike the present case, the letter in *Korea News*, on its face, stated specific items which directly dealt with wages and working conditions. The letter also stated what the employees' specific complaints were in relation to the supervisor. (Conditions in the department are "warlike due to the director's curses and his complete ignorance of the ordinary staff's opinions," which have led to numerous resignations.)

On the other hand, there exists a series of cases where petitions, protests or letters by employees concerning the company's selection of managerial personnel were not considered to be protected activity within the meaning of the Act. Cases such as *N.Y. Chinatown Senior Citizen Coalition*, 239 NLRB 614 (1978), and *Lutheran Social Service of Minnesota*, 250 NLRB 35 (1980), involved social service organizations similar to the Respondent in the present case. And both involved situations where internal politics relating to the selection of managerial personnel and each agency's policy goals were the primary

concerns of the employees. To my mind, both of the cited cases are very similar to the facts in the present case.

In *Lutheran Social Service of Minnesota* supra, the employer was a social welfare agency which, among other things, operated a home for children. The charging party, had applied for the job of assistant director on two previous occasions and he, along with another employee, were constant critics of the program who expressed their opinion that the director was incompetent. The ALJ, in a decision adopted by the Board, concluded that their activities, although concerted were not protected. He stated:

> While the conduct of Johnson and Schaefbauer was loosely concerted, it is hard to say that it was directed toward any particular objective. There is no evidence that they were attempting to organize a labor organization; they made no effort to invite the other employees into some informal coalition; they formulated no agenda; they filed no grievances; and they made no demands. What they did, essentially, was to complain, criticize and carp from, as it were, the sidelines.
>
> The statute protects protests in which there inheres action or the possibility of action. It has been applied even in cases where the dissatisfaction is embryonic and only hints at future group behavior . . . .
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> . . . . .
>
> Beyond that question is the equally troublesome one of whether the nature of the concerns . . . fall within the range if interests to which Section 7 is addressed. . . . As the Supreme Court has recently pointed out in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), there has been some conflict in the precedents, and perhaps as authoritative a definition as may be found anywhere was essayed in that case, to wit: "legitimate activity that could improve [the employees'] lot as employees." 437 U.S. at 567.
>
> Ordinarily, the applicability of the clause is not seriously in question . . . . On the periphery of the clause, however, there appears to be a tacit assumption that employee efforts to affect the ultimate direction and managerial policies of the business are beyond the scope of the clause. This distinction seems to be implicit in the line of cases which holds that protests against the appointment or termination of "low-level" supervisors may be protected when directly related to the employees' conditions of employment (*NLRB v Phoenix Mutual Life Insurance Company*, 167 F.2d 983, 987 (7th Cir. 1948); *NLRB v. Okla - Inn, d/b/a Holiday Inn of Henryetta*, 488 F.2d 498, 503 (10th Cir. 1973)), while similar activity with regard to "top management" of the employer is not safeguarded. *(Retail Clerks Union, Local 770, Retail Clerks International Association*, 208 NLRB 356, 357 (1974*); New York Chinatown Senior Citizens Coalition Center, Inc*., 239 NLRB 614, fn. 1 (1978).
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> . . . .
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> These statements . . . leave little doubt that Johnson and Schaefbauer were not at all troubled by any additional demands imposed upon them directly by the policy changes; what did disturb them were program decisions by management and the concomitant perceived lack of competency of management which, in their view, threatened the "quality of care," " the quality of the program," and the "welfare of the children." This sort of concern is wholly professional and commendable. It is, nonetheless, the kind of concern in the first instance confided by the statute, and our society, in management. Protest against the quality of the product ... and those vested with the ultimate authority to establish basic managerial guidelines and philosophy is not activity which could improve the employees' "lot as employees" (*Eastex, Inc.*, supra); that sort of interest is not encompassed by the "mutual aid or protection" clause, as the Board has made clear in the cases, previously cited, dealing with employee efforts to affect "top management."[5] [250 NLRB at 41–42.]

As noted above, the letter which is alleged as the protected concerted activity in this case, deals with several concerns, and does not, on its face, deal with any specific working conditions that the employees allege were of concern to them. A principle complaint of the letter deals not with their own terms and conditions of employment but rather with the status, power and money being paid to Blanche Polovetz, who was appointed temporarily as the acting director. The letter, although not calling for her replacement, demands, upon threat of a work stoppage, that the Respondent appoint a new director as soon as possible and that it do so in conjunction with DFTA, and without "outside interference."

The General Counsel contends that the appointment of Polovetz as acting director and the failure to appoint a new director, affected the jobs of the Respondent's employees. Counsel for the General Counsel in its brief makes the following contentions regarding the affects on working conditions.

1. That former Director Austin had skills operating the computers and because Polovetz had limited skills "a heavier burden fell on the employees." He claims that Peck and Mathew had to spend more time working on the computer, doing case inputs, closing cases, statistics, etc. He also claims that Peck had to deal with system malfunctions and had to spend time training Polovetz on the computer system.

2. That Austin was responsible for case decisions whereas Polovetz was unable to make decisions about cases or contribute meaningful assistance to case managers. He asserts that in the absence of an experienced director, case workers had to spend more time discussing cases among themselves and giving each other advice about case handling He claims that this had two results; first the employees spent less time on cases and second that Mathew and Peck worked greater hours without compensation by staying late and working weekends.

3. That Polovetz was a poor supervisor who adversely affected the office atmosphere, for example, by interrupting telephone calls between case workers and clients. He also claims that on one occasions, Polovetz asked Matthew to misrepresent to DFTA, during a periodic survey, that Matthew had credits towards a MSW. In this regard, the General Counsel asserts, without any supporting evidence, that if Matthew had acceded to this request and DFTA had found out about it, this might

[5] *Lutheran Social Services of Minnesota*, supra, was cited with approval in *Mitchel Manuals, Inc*., 280 NLRB 230, 232 fn. 7 (1986). The General Counsel cites a number of other cases which, because they do not deal with actions by employees to influence the selection of supervisors or managerial personnel, are not, in my opinion, really relevant to the present discussion. These included *Reading Hospital & Medical Center*, 226 NLRB 611 (1976); *Victoria Medical Group*, 264 NLRB 99 (1982); *Oakes Machine Corp*., 288 NLRB 456 (1988) *United Enviro Systems*, 301 NLRB 942 (1991); *Mapleview Nursing Home*, 302 NLRB 211 (1991); and *Delta Health Center*, 310 NLRB 26 (1993).

have resulted in DFTA requesting the Center to take disciplinary action including discharge against Matthew.

4. That requiring Mercado to issue paychecks to Polovetz in the amount authorized by the Board, without written authorization, would violate DFTA regulations and could somehow lead to her discharge or discipline.

Notwithstanding that the retirement of Austin left one fewer person to do the work at the Multi-Service Center, there is no evidence that the remaining employees were required *by their employer*, to work longer hours or to work without overtime compensation. No one told them that they had to work more hours or on weekends and no one told them that they could not put in for premium pay if they did so.

In the absence of Austin, it may be true that the social workers consulted more with each other about the care of their clients. But these were people who had training and experience in what I believe they would like to think of as a professional job, requiring independent judgment on their part.

Regarding the computers, the testimony of the employees was that they needed help from Mr. Austin and that their work was harder in his absence. Inasmuch as this record sheds little light on the computers, the software involved, or the purposes for which they were used, these generalized assertions have little weight. (Most basic computer skills such as word processing and the basic use of spreadsheets and data bases, do not require much training and often can be learned by reasonably intelligent people from the manuals that accompany the machines.) In the absence of such evidence or evidence that the employees were required by their employer to have such skills, I really don't know what they were complaining about. Moreover, there is no requirement that the director of the Center have computer skills at all, much less such skills that the staff seems to have believed would have been useful for their convenience.

I have already discussed the situation with Mercado and her refusal, as the bookkeeper, to issue a paycheck to Polovetz in the amount authorized by the Respondent's Board. Rather than being protected concerted activity, I view her actions in this regard, as insubordinate behavior, which would have justified her discharge. Indeed, as she was told on Monday, April 21, that her job had been contracted out, whereas the decision to discharge the other employees had not yet been made, I would conclude that the decision to contract out her job was motivated not by her signature on the letter, but rather by her past refusals to pay Polovetz.

One of Ms Mathew's objections to Polovetz was her assertion that on one occasion, Polovetz asked her to misrepresent her academic credits to DFTA. As noted, I do not consider this to relate to her terms and conditions of employment and the General Counsel's assertion that there might be some causal link between her acceding to this request and the possibility that it could have led to Mathew's discipline or discharge, is so conjectural as to be outside the range of reasonable possibility.

Notwithstanding the alleged affects of having Polovetz as the acting director and not having a properly credentialed person as director, the alleged affects were *not* stated in the August 4 letter, and in this regard, the testimony sounds to me like a post hoc rationalization.

The evidence as a whole is consistent with the assertion by the employees in their letter, that they were distracted by issues of status, power and money when Blanche Polovetz was appointed as acting director. It is completely understandable that people with "proper credentials" might exhibit jealousy to someone who did not have such credentials and who was "elevated," even for a short time, to a position having more status, more potential power and more money than they. Moreover, the record indicates that in addition to these concerns, the employees' other major objective was to promote the hiring of Ms. Mercado's boyfriend to the director's job which was the highest ranking position at the Multi-Service Center.

For all of the reasons stated above, it is my conclusion that the August letter did not constitute protected concerted activity and therefore that the discharge of Peck, Mathew, and Mercado did not violate the Act.

CONCLUSIONS OF LAW

The Respondent has not violated the Act in any manner as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

APPENDIX A

Letter dated August 4, 1995.

The Co-op city Multi-Service Center for Senior Citizens is in a state of crisis and we are asking for help from the New York City Department for the Aging.

On March 10, 1995, Mr. William Austin, MSW, resigned as director of the Co-op city Multi-Service Center. Since that time the office has been without a director and there are currently no plans to find a replacement. We are without appropriate supervision, and like any other agency, require professional social work supervision. In response to Mr. Austin's resignation, the sponsor of the Multi-Service Center, the Senior Citizens Coordinating Council (SCCC) has voted to make Mrs. Blanche Polovetz the acting director of our agency. Mrs. Polovetz has been the OFFICE MANAGER/CASE AIDE of the agency since its inception. She has made (and continues to make) important contributions to our agency in this capacity. But because of her previous position and her lack of qualifications (no college degree or formal social work training), we as a staff are placed in an awkward position for several reasons:

> 1. As the Office Manger / Case Aide, under DFTA regulations, Mrs. Polovetz has never been authorized to do home assessments for EISEP services. Now, as Acting Director, she is being given the authority to supervise and make decisions over those who are trained to do those assessments.
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> 2. Two staff members from each of the programs under the Senior Citizens Coordinating council (the Multi-Service Center and the Co-op City Nutrition Program) are members of the SCCC board which governs the programs (see enclosed board list). These staff members are the Director of the Multi-Service Center (now vacant), Mrs. Polovetz, Ms. Candice Harris, Director of Co-op City Nutrition, and Mrs. Ceil Goodman, Assistant Director of Co-op City Nutrition. We believe this creates a serious conflict of interest. there are not checks and balances. There is no one to take responsibility over the agency staff members' practices. As it is, it seems to us that DFTA is also reneging on this responsibility.
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> 3. To compound #2 above, the board of SCCC was put together with representatives of the many senior clubs in Co-op city 18 years ago. Many of these members are still on the board and are friends with Mrs. Polovetz. The

board does not have authority over Mrs. Polovetz and Ms. Harris. Mrs. Polovetz and Ms. Harris have authority over the board. In short, Mrs. Polovetz and Ms. Harris are the board. This is why they voted Mrs. Polovetz to be Acting Director. The board does not understand the implications of this. We believe Ms. Harris would like Mrs. Polovetz to become permanent Director of the Multi-Service Center because she is positioning herself to become Executive Director of the Senior Citizens Coordinating Council, thereby merging the two programs together.

Our dilemma has made it difficult for us to give our clients the highest quality care management. Instead, we are distracted by issues of office status, power and monetary gain, forcing us to ask ourselves questions like these:

Who can we turn to when we have a question regarding a case? Again, Mrs. Polovetz is not qualified and Ms. Harris' agency has never provided case management.

Who is supervising us on a regular basis and reviewing our cases?

Who is updating us on new policies and procedures?

Having nowhere else to turn, we have looked to the Department for help. Several weeks ago, we began contacting the Department to inform the Program Officer, Program Director and Director of Bronx Programs of the urgent status of our agency's situation. We were hoping to solve this problem in a discreet manner, with as little disruption as possible. Unfortunately, we have received an inadequate response and believe we have no alternative but to take this course of action. The following is a summary of what we know has happened so far:

1. Mrs. Polovetz and SCCC board member Sylvia Halpern met with Jorge Romero of DFTA on May 15, 1995 regarding Mrs. Polovetz' qualifications for the position of director. According to Mr. Romero, Mrs. Polovetz is not qualified for the position. In addition, DFTA did not approve Mrs. Polovetz as Assistant, Acting or permanent Director of the Multi-Service Center due to her lack of qualifications. He said, however, that if the SCCC board wanted to do so, they could make Mrs. Polovetz Acting Director, but DFTA could assume no responsibility for this decision and its resulting implications.

2. This message from Mr. Romero was in direct response to any inquiry from the Multi-Service Center bookkeeper asking for written DFTA approval to pay Mrs. Polovetz on the Director's salary line. Mr. Romero informed the bookkeeper that an agreement was reached between DFTA and SCCC at the May 15, 1995 meeting. If SCCC wanted to do so, they could pay Mrs. Polovetz on the Director's salary line with the following stipulation: this was to be a temporary situation while SCCC conducted a search for a new Director, and an advertisement for a new Director must be placed in the newspaper. To date, this has not been done. In addition, Mr. Romero stated that the bookkeeper must get written approval from SCCC in order to pay Mrs. Polovetz on the Director's salary line. Since then, the bookkeeper has not gotten SCCC written approval and has not paid Mrs. Polovetz on the Director's line.

3. The Multi-Service staff has met and composed this letter. We are writing to you urging you to take immediate action concerning this matter. We each feel very strongly and united in this cause and are ready to take further action if our pleas go unanswered. Therefore, if we do not see movement in the hiring a new Director (without interference and with significant DFTA involvement) we, staff of the Co-op City Multi-Service Center are prepared to take a job action wherein we will begin not reporting to work until sufficient measures are take to hire a new Director.